

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Registration Nos. 2,793,533, 2,634,215 and 2,735,848
Issued on December 16, 2003, October 12, 2002 and April 22, 2003, respectively

GLENN DANZIG, Petitioner, v. CYCLOPIAN MUSIC, INC., Registrant.	Cancellation No. 92045173 Mark: MISFITS Our File No.: 64162-0002
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Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

CERTIFICATE OF MAILING

I hereby certify that this correspondence and the identified enclosures are being deposited with the U.S. Postal Service overnight Express Mail, postage prepaid, in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451 on September 22, 2006

By: _____

Simone Robinson

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner Glenn Danzig (hereinafter "Petitioner"), through his undersigned counsel, hereby moves pursuant to Rule 56 of the Federal Rules of Civil Procedure and 37 C.F.R. 2.127 of the Trademark Rules of Practice for entry of summary judgment in its favor.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION AND SUMMARY OF FACTS

Petitioner seeks cancellation of three trademarks registrations ostensibly owned by Cyclopien Music, Inc. (hereinafter "Registrant"): Registration No. 2,793,533, for the word mark MISFITS for goods in International Class 014, Registration No. 2,634,215 for the word mark



09-22-2006

U.S. Patent & TMO/TM Mail Rpt Dt. #30

MISFITS for goods in International Class 009, and Registration No. 2,735,848 for the stylized MISFITS mark for goods in International Class 009 (collectively, the "MISFITS Marks").

Petitioner was a founding member of the punk rock band "The Misfits," which gained popularity beginning in the late 1970s and continuing through the early 1980s. The principals of Registrant, Gerald and Paul Caiafa, were also members of The Misfits. Following the band's break-up in 1983, legal disputes arose regarding the ownership of The Misfits' royalties and song rights. These disputes culminated in a 1994 Settlement Agreement between Messers. Caiafa and Petitioner, which resolved issues of ownership, rights of performance, and rights in the MISFITS trademarks. *See* Declaration of Brian W. Kasell, Ex. 1. The Settlement Agreement provides for the parties' co-ownership "of the name and trademarks of the Misfits and all logo(s) and artwork . . . previously associated therewith." *Id.* Messers. Caiafa were given the exclusive right to perform and record as The Misfits, but Petitioner, in addition to co-owning the MISFITS trademarks, retained the right to manufacture and sell merchandise, previously recorded music and performances, and other goods and services under the marks. *Id.*

In October and November 2000, Registrant filed three trademark applications for the MISFITS Marks. In those applications, Registrant was listed as sole owner of the MISFITS Marks. Registration was granted in 2003. Registrant subsequently sought to enforce its alleged trademark rights against Petitioner and Petitioner's licensees, asserting that the registration of the MISFITS Marks gave Registrant the sole and exclusive right to manufacture and sell products under the Misfits name and denying Petitioner's rights of co-ownership under the 1994 Settlement Agreement. *See, e.g., Kasell Decl., Ex. 2.*

It is well-established that only the owner of a trademark may apply for registration of that mark. *See, e.g., 15 U.S.C. § 1051(a); J. Thomas McCarthy, 3 McCarthy on Trademarks and*

Unfair Competition § 19:53 (4th ed.). Further, an application by only one of several joint owners of a mark is void, as the application must be filed in the name of the joint owners, not a single owner. *See, e.g.*, Trademark Manual of Examining Procedure § 803.03(d); *Ex parte Edward Taylor and Isabelle Stone Taylor doing business as Baby's Spray-Tray Co.*, 18 U.S.P.Q. 292 (1933). Because Registrant was not the exclusive owner of the MISFITS Marks, Registrant could not properly register these Marks. Accordingly, Registrant's registrations of the MISFITS Marks are void and subject to cancellation.

II.

SUMMARY JUDGMENT IS PROPER

A. Summary Judgment Standard

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56(c). The Board regards summary judgment as a "salutary method of disposition" and will not hesitate to dispose of cases on a motion for summary judgment. *See Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560 (Fed. Cir. 1987) .

The moving party bears the initial burden of establishing that there are no genuine issue of material fact, but is not required to disprove the other party's case. Rather, the moving party can meet its burden by pointing out the absence of evidence of a genuine issue of material fact from the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986).

When the moving party's burden has been satisfied, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The mere existence of a scintilla of evidence in

support of the non-moving party's position is insufficient: "[t]here must be evidence on which a reasonable jury could reasonably find for the [non-moving] party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

B. Summary Judgment Is Favored in *Inter Partes* Proceedings

The Board considers summary judgment a "salutary method of disposition designed 'to secure the just, speedy and inexpensive determination of every action,'" and finds it a favored method of adjudicating *inter partes* proceedings. *Sweats Fashions v. Pannill Knitting Co.*, 4 U.S.P.Q.2d 1793, 1795 (Fed. Cir. 1987) (affirming Board's grant of summary judgment because there was no genuine issue of material fact as to likelihood of confusion); *Pure Gold, Inc. v. Suntex (U.S.A.), Inc.*, 222 U.S.P.Q. 741, 744 (Fed. Cir. 1984) (summary judgment "is to be encouraged in *inter partes* cases before the Trademark Trial and Appeal Board"); *Phoenix Closures v. Yen Shaing Corp.*, 9 U.S.P.Q.2d 1891, 1892 (T.T.A.B. 1988) ("the resolution of *inter partes* proceedings by means of summary judgment is to be encouraged").

C. This Case Is Ripe for Summary Judgment

Where, as here, there are no genuine issues of material fact, summary judgment is appropriate. Fed. R. Civ. Proc. 56. Petitioner's and Registrant's rights in the MISFITS Marks can be ascertained solely by reference to the 1994 Settlement Agreement between the Petitioner and Messers. Gerald Caiafa and Paul Caiafa, the principals of Registrant Cycloplan Music. See Kasell Decl., Ex. 1. The Settlement Agreement provides for Petitioner's co-ownership and use of the MISFITS Marks with Messers. Gerald Caiafa and Paul Caiafa. Such co-ownership, in and of itself, completely bars Registrant from claiming exclusive rights to use the MISFITS Marks. The

existence and nature of the Settlement Agreement are not subject to dispute. Accordingly, Petitioner is entitled to summary judgment in his favor and cancellation of the MISFITS Marks.

III.

PETITIONER IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

A. The Co-Owner of a Mark May Not Unilaterally Register the Mark

It is fundamental that only the owner of a mark may apply for registration of that mark. *See, e.g.*, 15 U.S.C. § 1051(a) ("The owner of a trade-mark used in commerce may apply to register his or her trade-mark."); 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 19:53 (4th ed.) ("The applicant must be the owner of the mark."); *New England Duplicating Co. v. Mendes*, 190 F. 2d 415, 417, 90 U.S.P.Q. 151 (1st Cir. 1951) (ownership of a mark is a condition precedent to registration); *Lantz Bros. Baking Co. v. Grandma Cake Co.*, 161 F. 2d 739, 745, 74 U.S.P.Q. 22 (1947) (the only person who is entitled to registration of a mark is its owner). An application filed in the name of an entity that did not own the mark at the time of the filing date of the application is void and registration must be refused. 37 C.F.R. § 2.71(d); Trademark Manual of Examining Procedure § 803.06; *Huang v. Tzu Wei Chen Food Co. Ltd.*, 849 F. 2d 1458, 7 U.S.P.Q.2d 1335 (1988). Strict compliance is required with this section of the Lanham Act, and the ownership requirement should not be waived. *See American Forests v. Sanders*, 54 U.S.P.Q.2d 1860, 1862 (2000) (finding that Section 1 of the Lanham Act must be strictly complied with and neither the Board nor the courts may waive the requirements of that section).

Where a mark is jointly owned, the application must be filed in the name of the joint owners, not by a single owner. *See, e.g.*, Trademark Manual of Examining Procedure § 803.03(d); *Ex parte Edward Taylor and Isabelle Stone Taylor doing business as Baby's Spray-Tray Co.*, 18 U.S.P.Q. 292 (1933) (as the mark was owned by joint owners, it was proper for the

joint owners to apply to register the mark together). A trademark registration provides the owner with the right to exclude all others from use of the registered mark, or any mark confusingly similar, for the goods listed in the application. Therefore, permitting one of several owners of a trademark to register the mark would allow the registering owner to exclude co-owners from use of the mark, thereby preventing these co-owners from exercising their lawful ownership rights. Accordingly, the Board has rejected applications where only one of several owners filed for registration, holding that the application must be filed in the name of the joint owners, not a single owner. *See In re Tong Yang Cement Corp.*, 19 U.S.P.Q.2d 1689, 1689-90 (1991) (finding application void where applicant corporation was one of three that owned the mark as a joint venture).

Where, as here, a joint owner has registered a mark solely in his own name, without listing all joint owners as registrants, the registration is void. In such cases, cancellation is appropriate.

B. Registrant Is Not the Exclusive Owner of the MISFITS Marks and the Registration Is Therefore Void

The applications for the MISFITS Marks, filed on October 2, 2000, October 23, 2000, and November 20, 2000, list Registrant as the sole owner of the Marks. Similarly, Registrant is listed as sole owner in the Registrations for the MISFITS Marks. However, the 1994 Settlement Agreement provides for co-ownership between Petitioner and Messers. Caiafa "of the name and trademarks of the Misfits and all logo(s) and artwork . . . previously associated therewith." *See Kasell Decl., Ex. 1.*¹ Accordingly, Petitioner has a contractual right to co-ownership of the MISFITS Marks, separate and apart from his rights arising from use of the marks. In addition,

¹ The Settlement Agreement states that Messers. Gerald Caiafa and Paul Caiafa have the "exclusive right to publicly perform and record as the 'Misfits'." But this exclusive right is separate from, and has no impact on, the trademark co-ownership rights of Petitioner. Accordingly, it also has no bearing on the issue of whether or not Registrant is the exclusive owner of the MISFITS marks.

Petitioner has been using the MISFITS Marks on t-shirts, apparel and other merchandise, which are included in the goods and services recited in the subject registrations. *See, e.g., Kasell Decl., Ex. 3 & 4.* Petitioner's use in accordance with the parties' Settlement Agreement, as well as his rights under that contract, suffice to maintain Petitioner's rights in the MISFITS Marks.

In these circumstances, Registrant cannot claim a right of exclusive ownership in the MISFITS Marks. The Settlement Agreement, to which the principals of Registrant, Messers. Gerald and Paul Caiafa were signatories, prevents any party to that Agreement from asserting exclusive rights in the MISFITS Marks. *Id.* By applying for trademark protection as putative owner of the MISFITS Marks, Registrant has done just that, in contravention of the applicable rights and duties under the Settlement Agreement. Through its registration of the MISFITS Marks, Registrant seeks to exclude Petitioner from using the Marks and from exercising Petitioner's rights under the Settlement Agreement.

The undisputed facts therefore establish that, at the time the applications for the MISFITS Marks were filed with the Patent and Trademark Office, Registrant was not the exclusive owner of the MISFITS Marks. Pursuant to the Settlement Agreement, Petitioner had an ownership interest in the MISFITS Marks at that time and continues to hold such an interest in the Marks. Where a registrant is but one of several owners of the mark, an application for registration is void, and any issued registration is similarly void and subject to cancellation. *See In re Tong Yang Cement Corp.*, 19 U.S.P.Q.2d at 1689-90. Here, Registrant's failure to identify all owners of the MISFITS Marks in the applications for registration voids these registrations. 37 C.F.R. § 2.71(d).

Because the Settlement Agreement expressly provides for co-ownership of the MISFITS Marks and prevents any party to that Agreement from excluding any other party from use of

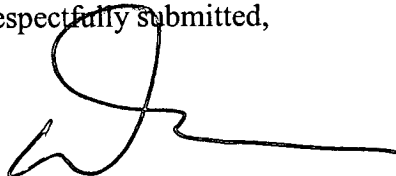
these Marks, Registrant is not the exclusive owner of the MISFITS Marks. Accordingly, the registrations for the MISFITS Marks are void and subject to cancellation, and Petitioner's Motion for Summary Judgment of Cancellation should be granted.

IV.
CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that its motion for summary judgment be granted and Registrant's MISFITS Marks registrations cancelled.

Date: September 21, 2006

Respectfully Submitted,



Rod S. Berman
Brian W. Kasell
Zoey Kohn
JEFFER MANGELS BUTLER & MANGELS
1900 Avenue of the Stars, 7th Floor
Los Angeles, California 90067-4308
(310)203-0567
Attorneys for Glenn Danzig

CERTIFICATE OF SERVICE

It is hereby certified that on **September 22, 2006**, a copy of the foregoing **PETITIONER'S MOTION FOR SUMMARY JUDGMENT** has been sent by first class mail, postage prepared to the attorney of record for Registrant:

Curtis B. Krasik
Sabrina J. Hudson
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP
535 Smithfield Street
Pittsburg, Pennsylvania 15222
Telephone: (412) 355-6500
Facsimile: (412) 355-6501

A handwritten signature in black ink, appearing to read 'Simone Robinson', is written over a horizontal line.

Simone Robinson

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Registration Nos. 2,793,533, 2,634,215 and 2,735,848
Issued on December 16, 2003, October 12, 2002 and April 22, 2003, respectively

GLENN DANZIG, Petitioner, v. CYCLOPIAN MUSIC, INC., Registrant.	Cancellation No. 92045173 Mark: MISFITS Our File No.: 64162-0002
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Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

CERTIFICATE OF MAILING

I hereby certify that this correspondence and the identified enclosures are being deposited with the U.S. Postal Service overnight Express Mail, postage prepaid, in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451 on September 22, 2006.

By: _____

Simone Robinson

DECLARATION OF BRIAN W. KASELL IN SUPPORT OF
PETITIONER'S MOTION FOR SUMMARY JUDGMENT

HIGHLY CONFIDENTIAL MATERIALS REDACTED FROM THIS DOCUMENT.

NON-REDACTED VERSION FILED UNDER SEAL.

I, Brian W. Kasell, declare that:

1. I am an attorney at law duly licensed to practice in the State of California and before this Court. I am a partner with Jeffer, Mangels, Butler & Marmaro LLP, counsel of record for Petitioner Glenn Danzig ("Petitioner") in this action. I have personal and direct knowledge of the facts stated herein and, if called upon as a witness, I could and would testify competently thereto. This declaration is submitted in support of Petitioner's Motion for Summary Judgment.

2. Attached hereto as Exhibit 1 is a true and correct copy of the 1994 Settlement Agreement between Petitioner, Paul Caiafa and Gerald Caiafa.

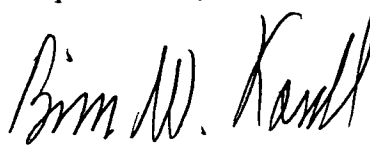
3. Attached hereto as Exhibit 2 are true and correct copies of letters sent by counsel for Registrant to companies that have been licensed by Petitioner to manufacture and sell merchandise under the MISFITS Marks in which Registrant's counsel threatens legal action against Petitioner's licensees as a result of their use of the MISFITS Marks.

4. Attached hereto as Exhibit 3 are true and correct copies of licensing agreements through which Petitioner contracted for the production and distribution of merchandise under the MISFITS Marks.

5. Attached hereto as Exhibit 4 are true and correct copies of sample MISFITS merchandise produced and sold on behalf of Petitioner.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed in Los Angeles, California on September 21, 2006.



Brian W. Kasell

EXHIBIT 1

EXHIBIT FILED
UNDER SEAL

EXHIBIT 2



Kirkpatrick & Lockhart Nicholson Graham LLP

Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222-2312
412.355.6500
Fax 412.355.6501
www.klmg.com

October 10, 2005

Curtis D. Krasik

BY FACSIMILE AND FEDERAL EXPRESS

412.355.8998
Fax: 412.355.6501
ckrasik@klmg.com

Medicom Toy Corporation
Attn: Nauc Oka
3-22-5 Uehara, Shibuya-Ku
Tokyo, 151-0064 Japan

Re: Glenn Danzig Figures

Dear Mr. Oka:

We are counsel to Cyclopien Music, Inc. ("Cyclopien"). Your correspondence to Cyclopien's John Caffero requesting approval of the packaging (the "Packaging") for Medicom Toy Corp.'s ("Medicom") Glenn Danzig figures has been forwarded to us for response. In the future, kindly direct all communications in this matter to our office.

In response to your inquiry, please be advised that Cyclopien does not approve the Packaging. While we have not had the opportunity to engage in a comprehensive review of this matter given the immediacy of your request, we note the following objections Cyclopien has to the Packaging at this time.

First, although Cyclopien previously consented to the use of THE MISFITS mark in connection with the Danzig MISFITS-era figure, Cyclopien did not consent to, and there is no reason for, the use of THE MISFITS mark on the Packaging of Danzig's SAMHAIN-era and DANZIG-era figures. We believe that such use of THE MISFITS mark in association with Danzig's SAMHAIN and DANZIG activities is likely to cause consumer confusion as to THE MISFITS' and Cyclopien's approval, sponsorship and/or affiliation with SAMHAIN, DANZIG and EVILIVE in violation of United States trademark law. Moreover, Cyclopien believes that the intermingling of its THE MISFITS mark Danzig's SAMHAIN, DANZIG and EVILIVE marks would dilute the distinctiveness of THE MISFITS mark equally in violation of United States trademark law as well as in violation of Paragraph 5(B) of the Toy Licensing Agreement between Cyclopien and Medicom effective as of September 1, 2001 (the "Cyclopien Toy Licensing Agreement").

Second, pursuant to your agreements and written representations, Mr. Caffero was supposed to be credited as "Producer" on the Packaging. Indeed, as you well know, Mr. Caffero consistently has been credited as "Producer" on prior figures with which he has been involved and there can be no dispute that Mr. Caffero acted as Producer for the Danzig figures. Mr. Caffero specifically relied on your agreements and representations that he would be credited as "Producer" on the Packaging in part as consideration for his participation in this project.

PL1430718 v.2

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DANZ 0005



Kirkpatrick & Lockhart Nicholson Graham LLP

Narue Oka

October 10, 2005

Page 2

Please feel free to contact me should you wish to discuss these matters further.

The statements made herein are not made to the exclusion of any other rights, remedies or defenses to which Cycloplan is entitled and nothing in this letter nor any act or omission of Cycloplan should be construed as a waiver of any of Cycloplan's rights, remedies or defenses, all of which are expressly reserved.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Curtis B. Krasik'. The signature is written in a cursive, flowing style with a large initial 'C'.

Curtis B. Krasik

CBK:mac

DANZ 0006



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August 30, 2005

Curtis B. Krasik

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ckrasik@klmg.com

BY FACSIMILE AND FEDERAL EXPRESS

Robert Arce
Chaser Merchandising
120 W. 157th Street
Gardena, CA 90248

Hadi Salem
President
B & H Company
120 W. 157 Street
Gardena, CA 90248

RE: Unauthorized Use OF MISFITS Marks

Dear Messrs. Arce and Salem:

We are counsel to Cyclopien Music, Inc. ("Cyclopien"). Cyclopien and its principal, Jerry Caiafa ("Jerry Only"), have the exclusive right to publicly perform and record as the MISFITS, which they have done both domestically and internationally for more than a decade. As such, all consumer recognition and good will with respect to the MISFITS over that time has exclusively been associated with, and inured to the benefit of, Cyclopien. Moreover, Cyclopien has significantly developed the MISFITS as a musical and cultural phenomena and, in the process, considerably expanded the audience and fan base for MISFITS goods and services. Indeed, Cyclopien has developed an extensive MISFITS merchandise licensing program ancillary to the MISFITS popularity and success as a musical group. In recognition of these activities, Cyclopien is the exclusive owner of U.S. trademark registration numbers 1844159, 2634215, 2735848, 2770984 and 2793533, and trademark application numbers 76605515 and 76605840 for numerous classes of goods and services in connection with the MISFITS and related designs and logos (the "MISFITS marks").

We understand that Chaser has begun promoting and selling an entire line of MISFITS-related merchandise without authorization or license from Cyclopien. Specifically, as advertised at the Magic convention in Las Vegas, you are selling MISFITS t-shirts, apparel, and assorted merchandise that unfairly trade on the significant goodwill Cyclopien has successfully developed in the MISFITS and the MISFITS marks. Your unauthorized use of the MISFITS marks and, in particular, Cyclopien's "Fiend Skull," a trademark exclusively developed by Cyclopien and uniquely associated with its MISFITS goods and services, is likely to create consumer confusion as to Cyclopien's affiliation, sponsorship and/or approval of such merchandise. Furthermore, certain of your merchandise depicts an inferior version of the "Fiend Skull" which is likely to create consumer confusion as to Cyclopien's affiliation, sponsorship and/or approval with those artistically and commercially inferior products and, consequently, dilute and diminish the value of Cyclopien's valuable trademark rights in the "Fiend Skull" in the marketplace. We also are particularly concerned that certain merchandise depicts new designs that have no historical or



Kirkpatrick & Lockhart Nicholson Graham LLP

Robert Arce
Hadi Salem
August 30, 2005
Page 2

artistic relationship to the MISFITS. As such, your unauthorized use of Cyclopien's MISFITS marks constitutes willful trademark infringement and trademark dilution under the law.

There can be no argument that you somehow have been unaware of Cyclopien's trademark rights. As you know, in the late-1990's Chaser manufactured and distributed MISFITS-related merchandise pursuant to a license from Cyclopien. As you further know, that license was terminated in or around 2000, at which point Chaser stopped selling MISFITS-related merchandise. In that regard, it appears that certain of your MISFITS-related merchandise depicts designs created pursuant to that terminated-license, for which Cyclopien is the exclusive copyright owner. As you also know, since that time Chaser has made several offers to Cyclopien to reacquire MISFITS merchandising rights. Chaser thus is distinctly aware that Cyclopien owns such MISFITS merchandising rights and that it requires a license from Cyclopien to produce and sell MISFITS-related merchandise. I am advised, in fact, that the discussions with Chaser were specifically conducted between the two of you on behalf of Chaser and John Cafiero of Cyclopien.

It appears that having been denied a license from Cyclopien, Chaser solicited and obtained a license from Glenn Danzig ("Danzig") with respect to purported rights he claimed based on his involvement in the MISFITS from 1977-1983. Chaser thus attempted to obtain by indirection that which it could not obtain directly. For the following reasons, we believe that Danzig had no protectable rights in the MISFITS marks to license to you in the first instance based on fundamental principles of trademark law.

In light of your experience in merchandising, you know that the touchstone of a trademark is to identify and distinguish a single commercial source. If more than one unrelated entity is selling goods or services under the same mark, such multiple, fragmented use results in consumer confusion and an inability to control the quality of goods and services in the marketplace. This is precisely the untenable situation Cyclopien faces here. Moreover, based on Danzig's stated intention not to be associated with the MISFITS as a continuing musical entity as reflected in, among other things, Danzig's abandonment of MISFITS trademark applications over ten years ago and nonuse of the MISFITS trademarks in commerce, Danzig—the putative source of your purported licensing rights—long ago abandoned any rights he may at one time have had in any such marks. In fact, Danzig is prohibited from performing, recording or otherwise holding himself out to the public as the MISFITS, and from being associated with the current MISFITS musical group, which is the essence of commercial recognition and goodwill in the MISFITS marks.

Recently, we learned that Bravado, as successor to Blue Grape, was selling similarly infringing MISFITS-related merchandise based upon a purported license from Danzig. After contacting Bravado and explaining the actual circumstances concerning MISFITS trademark rights, it is our



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Robert Arce
Hadi Salem
August 30, 2005
Page 3

understanding that Bravado has ceased the sale of its infringing MISFITS-related merchandise and its license with Danzig is terminated. We expect that upon considering the information provided in this letter you will reach the same conclusion as Bravado, and avoid the need for further legal action against Chaser and B&H.

Accordingly, we demand that you and any affiliated third parties cease and desist from unlawful use of the MISFITS marks. To that end, you must immediately:

1. Cease the production and distribution of any merchandise products depicting Cyclopien's MISFITS marks;
2. Provide an accounting of all proceeds from sales of products depicting Cyclopien's MISFITS marks;
3. Confirm in writing that you have fully complied with Cyclopien's demands by signing and returning the attached acknowledgement to the above-referenced address.

Cyclopien vigorously protects and enforces its intellectual property rights. If you do not comply with Cyclopien's demands by September 9, 2005, we intend to pursue all available legal remedies to which Cyclopien is entitled under federal and state law, including, but not limited to, (i) an injunction against the promotion or sale of merchandise depicting Cyclopien's intellectual property; (ii) an injunction confiscating all inventory of merchandise depicting Cyclopien's intellectual property; (iii) the disgorgement of all profits from sales of merchandise depicting Cyclopien's intellectual property; (iv) Cyclopien's actual damages (trebled as provided by law), (v) statutory damages (enhanced as provided by law) and/or (v) Cyclopien's attorney's fees and costs.

The demands made herein are not made to the exclusion of any other rights, remedies or defenses to which Cyclopien is entitled and nothing in this letter nor any act or omission of



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Robert Arce
Hadi Salem
August 30, 2005
Page 4

Cyclopian should be construed as a waiver of any of Cyclopian's rights, remedies or defenses, all of which are expressly reserved.

We look forward to your immediate response.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Curtis B. Krasik'. The signature is fluid and cursive, with the first name 'Curtis' being more prominent.

Curtis B. Krasik

CBK:mac



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Robert Arce
Hadi Salem
August 30, 2005
Page 5

ACKNOWLEDGEMENT

Chaser Merchandising, through the authorized representative set forth below, agrees to, and has fully complied with, the terms of Cycloplan Music, Inc.'s demand.

Signed: _____

Name Printed: _____

Title: _____

Date: _____

B&H Company, through the authorized representative set forth below, agrees to, and has fully complied with, the terms of Cycloplan Music, Inc.'s demand.

Signed: _____

Name Printed: _____

Title: _____

Date: _____

**Kirkpatrick & Lockhart Nicholson Graham LLP**

Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222-2312
412.355.6500
Fax: 412.355.6501
Fax: 412.355.6461

FAX

Date • August 30, 2005

No. of
Pages,
including
coversheet • 6**Transmit To •**

Name	Company	Phone	Fax
Robert Arce	Chaser Merchandising	310.719.7004.ext.202	310.719.9894
Hadi Salem	B & H Company	310.719.7004	310.719.9894

From • Curtis B. Krasik

Phone • 412.355.8696

Secretary • Mona A. Cornelia

Phone • 412.355.8688

Client/Matter Name

Client/Matter Number

Attorney Number

Cycloplan Music, Inc.

0236770/0104

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COMMENTS:

When you are sending to us, please be sure to include a cover sheet with your transmittal and a telephone number where you can be contacted in case of equipment malfunction.

Transmitted by:**Time:**

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PJ-1429303 v1

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Kirkpatrick & Lockhart Nicholson Graham LLP

Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222-2312
412.355.6500
Fax 412.355.6501
www.klmg.com

August 30, 2005

Curtis B. Krasik

BY FACSIMILE AND FEDERAL EXPRESS

412.355.8696
Fax: 412.355.6501
ckrasik@klmg.com

Robert Arce
Chaser Merchandising
120 W. 157th Street
Gardena, CA 90248

Hadi Salem
President
B & H Company
120 W. 157 Street
Gardena, CA 90248

RE: Unauthorized Use OF MISFITS Marks

Dear Messrs. Arce and Salem:

We are counsel to Cyclopien Music, Inc. ("Cyclopien"). Cyclopien and its principal, Jerry Caiafa ("Jerry Only"), have the exclusive right to publicly perform and record as the MISFITS, which they have done both domestically and internationally for more than a decade. As such, all consumer recognition and good will with respect to the MISFITS over that time has exclusively been associated with, and inured to the benefit of, Cyclopien. Moreover, Cyclopien has significantly developed the MISFITS as a musical and cultural phenomena and, in the process, considerably expanded the audience and fan base for MISFITS goods and services. Indeed, Cyclopien has developed an extensive MISFITS merchandise licensing program ancillary to the MISFITS popularity and success as a musical group. In recognition of these activities, Cyclopien is the exclusive owner of U.S. trademark registration numbers 1844159, 2634215, 2735848, 2770984 and 2793533, and trademark application numbers 76605515 and 76605840 for numerous classes of goods and services in connection with the MISFITS and related designs and logos (the "MISFITS marks").

We understand that Chaser has begun promoting and selling an entire line of MISFITS-related merchandise without authorization or license from Cyclopien. Specifically, as advertised at the Magic convention in Las Vegas, you are selling MISFITS t-shirts, apparel, and assorted merchandise that unfairly trade on the significant goodwill Cyclopien has successfully developed in the MISFITS and the MISFITS marks. Your unauthorized use of the MISFITS marks and, in particular, Cyclopien's "Fiend Skull," a trademark exclusively developed by Cyclopien and uniquely associated with its MISFITS goods and services, is likely to create consumer confusion as to Cyclopien's affiliation, sponsorship and/or approval of such merchandise. Furthermore, certain of your merchandise depicts an inferior version of the "Fiend Skull" which is likely to create consumer confusion as to Cyclopien's affiliation, sponsorship and/or approval with those artistically and commercially inferior products and, consequently, dilute and diminish the value of Cyclopien's valuable trademark rights in the "Fiend Skull" in the marketplace. We also are particularly concerned that certain merchandise depicts new designs that have no historical or



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Hadi Salem
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artistic relationship to the MISFITS. As such, your unauthorized use of Cyclopien's MISFITS marks constitutes willful trademark infringement and trademark dilution under the law.

There can be no argument that you somehow have been unaware of Cyclopien's trademark rights. As you know, in the late-1990's Chaser manufactured and distributed MISFITS-related merchandise pursuant to a license from Cyclopien. As you further know, that license was terminated in or around 2000, at which point Chaser stopped selling MISFITS-related merchandise. In that regard, it appears that certain of your MISFITS-related merchandise depicts designs created pursuant to that terminated-license, for which Cyclopien is the exclusive copyright owner. As you also know, since that time Chaser has made several offers to Cyclopien to reacquire MISFITS merchandising rights. Chaser thus is distinctly aware that Cyclopien owns such MISFITS merchandising rights and that it requires a license from Cyclopien to produce and sell MISFITS-related merchandise. I am advised, in fact, that the discussions with Chaser were specifically conducted between the two of you on behalf of Chaser and John Cafiero of Cyclopien.

It appears that having been denied a license from Cyclopien, Chaser solicited and obtained a license from Glenn Danzig ("Danzig") with respect to purported rights he claimed based on his involvement in the MISFITS from 1977-1983. Chaser thus attempted to obtain by indirection that which it could not obtain directly. For the following reasons, we believe that Danzig had no protectable rights in the MISFITS marks to license to you in the first instance based on fundamental principles of trademark law.

In light of your experience in merchandising, you know that the touchstone of a trademark is to identify and distinguish a single commercial source. If more than one unrelated entity is selling goods or services under the same mark, such multiple, fragmented use results in consumer confusion and an inability to control the quality of goods and services in the marketplace. This is precisely the untenable situation Cyclopien faces here. Moreover, based on Danzig's stated intention not to be associated with the MISFITS as a continuing musical entity as reflected in, among other things, Danzig's abandonment of MISFITS trademark applications over ten years ago and nonuse of the MISFITS trademarks in commerce, Danzig—the putative source of your purported licensing rights—long ago abandoned any rights he may at one time have had in any such marks. In fact, Danzig is prohibited from performing, recording or otherwise holding himself out to the public as the MISFITS, and from being associated with the current MISFITS musical group, which is the essence of commercial recognition and goodwill in the MISFITS marks.

Recently, we learned that Bravado, as successor to Blue Grape, was selling similarly infringing MISFITS-related merchandise based upon a purported license from Danzig. After contacting Bravado and explaining the actual circumstances concerning MISFITS trademark rights, it is our

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understanding that Bravado has ceased the sale of its infringing MISFITS-related merchandise and its license with Danzig is terminated. We expect that upon considering the information provided in this letter you will reach the same conclusion as Bravado, and avoid the need for further legal action against Chaser and B&H.

Accordingly, we demand that you and any affiliated third parties cease and desist from unlawful use of the MISFITS marks. To that end, you must immediately:

1. Cease the production and distribution of any merchandise products depicting Cyclopien's MISFITS marks;
2. Provide an accounting of all proceeds from sales of products depicting Cyclopien's MISFITS marks;
3. Confirm in writing that you have fully complied with Cyclopien's demands by signing and returning the attached acknowledgement to the above-referenced address.

Cyclopien vigorously protects and enforces its intellectual property rights. If you do not comply with Cyclopien's demands by September 9, 2005, we intend to pursue all available legal remedies to which Cyclopien is entitled under federal and state law, including, but not limited to, (i) an injunction against the promotion or sale of merchandise depicting Cyclopien's intellectual property; (ii) an injunction confiscating all inventory of merchandise depicting Cyclopien's intellectual property; (iii) the disgorgement of all profits from sales of merchandise depicting Cyclopien's intellectual property; (iv) Cyclopien's actual damages (trebled as provided by law), (v) statutory damages (enhanced as provided by law) and/or (v) Cyclopien's attorney's fees and costs.

The demands made herein are not made to the exclusion of any other rights, remedies or defenses to which Cyclopien is entitled and nothing in this letter nor any act or omission of



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Cycloplan should be construed as a waiver of any of Cycloplan's rights, remedies or defenses, all of which are expressly reserved.

We look forward to your immediate response.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Curtis B. Krasik'. The signature is fluid and cursive, with the first name 'Curtis' being more prominent.

Curtis B. Krasik

CBK:mac



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Robert Arce
Hadi Salem
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Page 5

ACKNOWLEDGEMENT

Chaser Merchandising, through the authorized representative set forth below, agrees to, and has fully complied with, the terms of Cycloplan Music, Inc.'s demand.

Signed: _____

Name Printed: _____

Title: _____

Date: _____

B&H Company, through the authorized representative set forth below, agrees to, and has fully complied with, the terms of Cycloplan Music, Inc.'s demand.

Signed: _____

Name Printed: _____

Title: _____

Date: _____

EXHIBIT 3

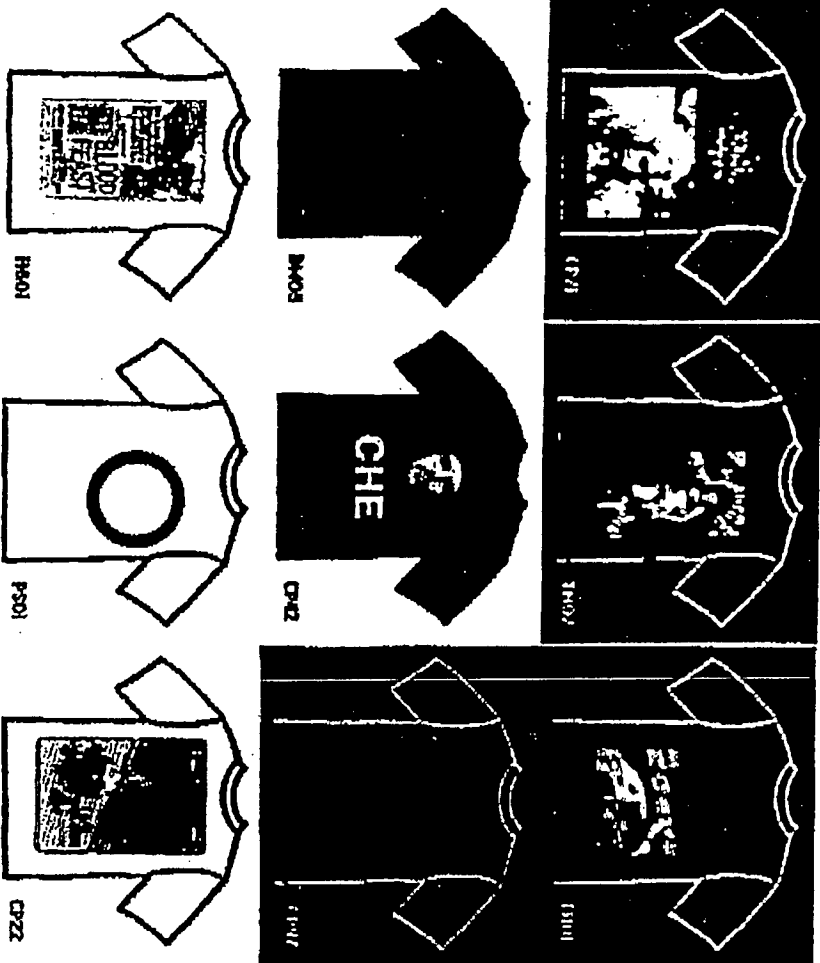
EXHIBIT FILED
UNDER SEAL

EXHIBIT 4

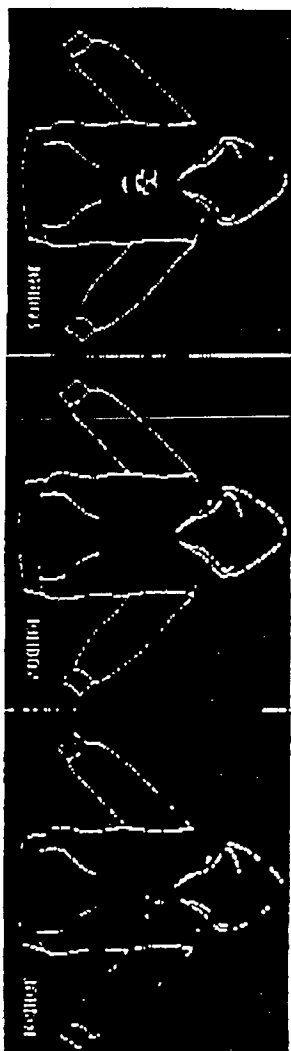
CHASER

www.chasershirts.com

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HOODED SWEAT SHIRTS \$27.00



STICKERS \$1.00

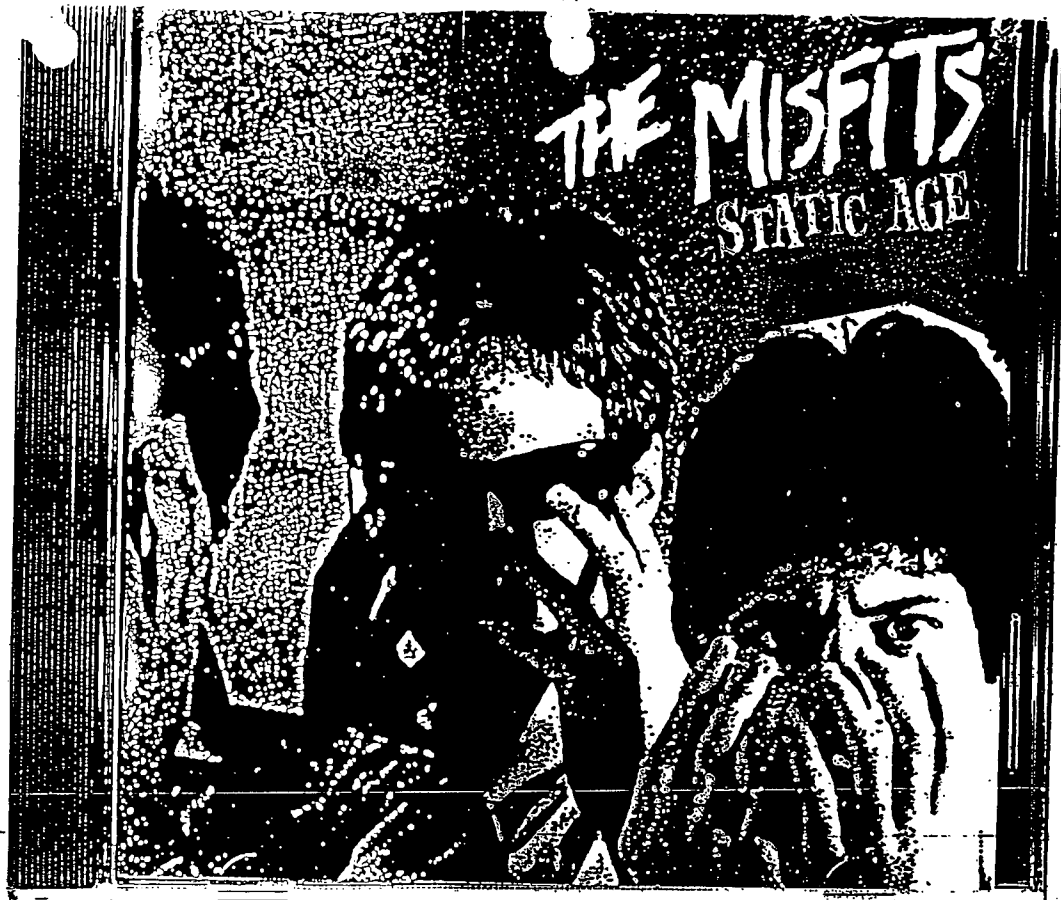


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CHASER
P. O. BOX 6964
BEVERLY HILLS, CA. 90212

FX# 310 271 4084
PH# 310 273 9611



Specimen: MISFITS

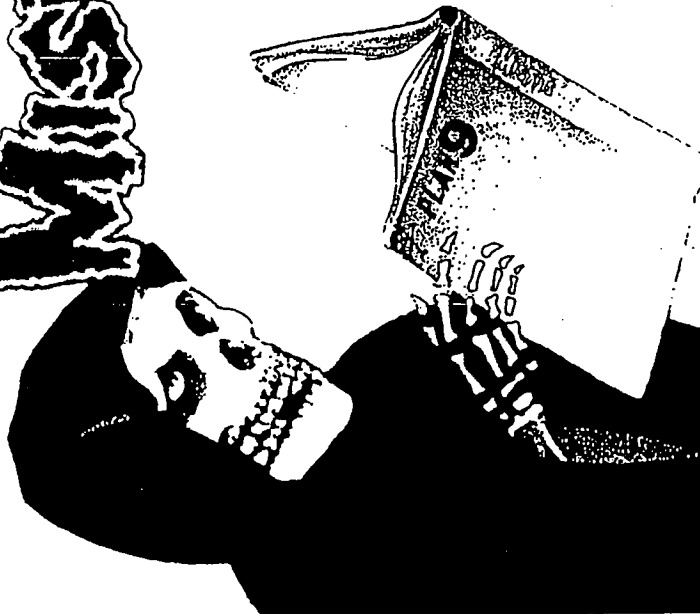
Class: 9

Goods: Musical sound recordings
and pre-recorded audio tapes and
videotapes featuring recorded
musical performances.

Glenn Danzig
c/o Verotik
2959 S. Sepulveda Blvd.
Los Angeles, CA 90064

DANZ 0208

MISFITS



PLAN 9

SHE HOLLYWOOD BABYLON
BULLET HORROR BUSINESS
TEENAGERS FROM MARS
NIGHT OF THE LIVING DEAD
WHERE EAGLES DARE
VAMPIRA
I TURNED INTO A MARTIAN
SKULLS
LONDON DUNGEON
GHOULS NIGHT OUT
ASTRO ZOMBIES
MOMMY CAN I GO OUT AND
KILL TONIGHT?
DIE, DIE MY DARLING
EARTH A.D.
DEVILOCK
DEATH COMES RIPPING
GREEN HELL
WOLFSBLOOD

CONTAINS PREVIOUSLY
UNRELEASED VERSIONS

Printed in Japan



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